

## CIRCUIT RULE 22-1

### CERTIFICATE OF APPEALABILITY (COA)

**(a) General Procedures.** Petitioners appealing the district court's judgment in either a 28 U.S.C. §§ 2254 and 2255 proceeding should follow the procedures set forth in Federal Rules of Appellate Procedure 4 and 22(b). A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, the court shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will not act on a motion for a COA if the district court has not ruled first. (Rev. 1-1-04)

**(b) District Court Records.** If the district court denies in full in a § 2254 proceeding, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a COA in full in a § 2255 proceeding, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion. (Rev. 1-1-04)

**(c) Grant in Part or in Full by District Court.** If the district court grants a COA as to any or all issues, a briefing schedule will be established by the court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. (Rev. 1-1-04) (Rev. 3-11-04)

**(d) Denial in Full by District Court.** If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals within thirty-five (35) days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. (Rev. 1-1-04)

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within thirty-five (35) days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA. (New 1-1-04)

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration. (New 1-1-04)

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified otherwise proceed according to section (e), below. (New 1-1-04)

**(e) Briefing Uncertified Issues.** Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA

and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the court will *not* extend the length of the brief to accommodate uncertified issues. (New 1-1-04)

**(f) Response to Uncertified Issues.** Respondent may, but need not, address any uncertified issues in its responsive brief. The court will afford respondent an opportunity to respond before relief is granted on any previously uncertified issue. (New 1-1-04)

**Cross Reference:** Fed. R. App. P. 27; Cir. R. 27-1; Fed. R. App. P. 32(a)(5)(6)(7). (New 1-1-04)

ADVISORY COMMITTEE NOTE TO CIRCUIT RULE 22-1

*The court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncertified issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, “Certified Issues” and then, in the same brief, shall discuss uncertified issues under the heading, “Uncertified Issues.” The court may decline to address uncertified issues if they are not raised and designated as required by this Rule. (rev. 1-1-04)*